A

BISI JINGGOT

v.

SUPERINTENDENT OF LANDS AND SURVEYS KUCHING DIVISION & ORS

B

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ABDULL HAMID EMBONG FCJ
C SURIYADI HALIM OMAR FCJ
HASAN LAH FCJ
[CIVIL APPEAL NO: 01(f)-11-05-2012(Q)]
11 JULY 2013

D ***[Editor's note: This judgment has been published in [2013] 6 CLJ 21 without the concurring judgment of Richard Malanjum CJ (Sabah & Sarawak). We have since obtained the concurring judgment and have decided to republish the case in full. Kindly disregard [2013] 6 CLJ 21].***

E ***LAND LAW:*** *Customary land - Native Customary Rights (NCRs) - Claim for - Whether appellant acquired NCRs over parcels of land through sale and purchase agreements - Creation of native customary land - Whether conditional upon adherence to custom or common practice of community - Whether acquisition of NCR by clearance, cultivation and*
F *occupation of land or inheritance undertaken by appellant - Whether individual customary rights transferable by sale or otherwise for value - Whether appellant eligible to inherit or acquire through "tungkus asi" procedure - Appellant not native of community - Whether appellant failed to qualify as legitimate recipient from vendors - Sarawak Land Code*
G *1958, s. 5(2)(f)*

NATIVE LAW AND CUSTOM: *Declaratory order - Application for - Land dispute - Native Customary Rights (NCRs) - Whether appellant acquired NCRs over parcels of land through sale and purchase agreements*
H *- Creation of native customary land - Whether conditional upon adherence to custom or common practice of community - Whether acquisition of NCR by clearance, cultivation and occupation of land or inheritance undertaken by appellant - Whether individual customary rights transferable by sale or otherwise for value - Whether appellant eligible to inherit or*
I *acquire through "tungkus asi" procedure - Appellant not native of community - Whether appellant failed to qualify as legitimate recipient from vendors - Sarawak Land Code 1958, s. 5(2)(f)*

NATIVE LAW AND CUSTOM: *Land dispute - Native Customary Rights (NCRs) - Whether appellant acquired NCRs over parcels of land through sale and purchase agreements - Creation of native customary land - Whether conditional upon adherence to custom or common practice of community - Whether acquisition of NCR by clearance, cultivation and occupation of land or inheritance undertaken by appellant - Whether individual customary rights transferable by sale or otherwise for value - Whether appellant eligible to inherit or acquire through "tungkus asi" procedure - Appellant not native of community - Whether appellant failed to qualify as legitimate recipient from vendors - Sarawak Land Code 1958, s. 5(2)(f)*

The appellant, an Iban/Sea Dayak by race and a native of Sarawak, filed a writ of summons at the High Court, seeking declarations against the respondents involving three parcels of land. The appellant pleaded that he had acquired native customary rights ('NCR') over the said parcels of land through sale and purchase agreements ('S&Ps') and through a mixture of customary and other legal means. The first parcel of land comprised eight lots bought under eight different S&Ps from five different NCR beneficial owners who had acquired the NCR by means of Iban's customary land prior to 1 January 1958. The appellant pleaded that he had continuously occupied and cultivated those eight lots of land. The appellant also pleaded that by his continuous occupation and cultivation of the said first parcel of land, along with the second parcel of land, together with the rights given to extract timber from the third parcel of land, he had acquired NCR over them. The declarations sought for by the appellant were, *inter alia*, that with the acquisition of the NCR, all the respondents were precluded from impairing the appellant's rights over the three parcels of land. He pleaded that two issue documents of title were issued for areas known as Lots 85 and 86 in favour of the fourth respondent by the first and second respondents. The areas of Lots 85 and 86 covered or included portions of all three parcels claimed by the appellant inclusive of the said eight lots obtained *vide* the said S&Ps. He claimed that his NCR over the lands had been impaired and their inclusion in the two issue documents was null and void, irregular and unlawful as no prior extinguishment of his NCR had ever taken place. The High Court, however, dismissed the appellant's prayers for declaratory and consequential orders. The Judicial Commissioner ('JC') found that the appellant's alleged acquisition of the NCR was pursuant to ordinary sale and purchase transactions and further opined that the NCR could not

A be transferred to another person by such means. The Court of Appeal, in dismissing the appellant's appeal, further held the view that it was legally bound to take judicial notice of the customary law established by the Native Court of Appeal in Sarawak particularly the NCR principle having been created or acquired by
B natives through the practice of their customs, with such rights not transferable for value to someone else outside the community or district. The Federal Court granted the appellant leave to appeal based on these questions: (i) whether the alleged adat or custom that "individual customary rights are not transferable by sale or
C otherwise for value" referred to and applied in *Sumbang Ak Sekam v. Engkarang Ak Ajah* ceased to exist and enforceable as such: (a) upon enactment of the same as law under s. 2 of the Fruit Trees Order 1889 of the Rajah's Order; and/or (b) upon the subsequent repeal of the said Rajah's Order; and (ii) whether by
D virtue of s. 6 of the Sarawak Land Code, the alleged adat or custom applied only to land gazetted as native communal reserve.

Held (dismissing appeal with costs)
Per Suriyadi Halim Omar FCJ delivering the judgment of
E **the court:**

(1) Being an Iban, the provision of s. 2 of the Fruit Trees Order 1889 applied to the appellant. The Fruit Trees Order 1889 merely confirms the existence of a dual system of land *ie*, one subject to grant and the other not. Interpretatively,
F under the system where a Dayak has a grant, he could claim, sell or transfer any farming ground in such river or district, to others. Under the other sisterly system, where the Dayak has no grant, *ie*, untitled land and invariably applicable to customary land, he may not claim, sell or transfer any
G farming ground in such river or district. Whether s. 2 of the Fruit Trees Order 1889 was enacted or repealed subsequently made no difference to Native Customary Land or of the law and rights attached to it as its subsistence was guaranteed. The subsequent enactment of the Sarawak Land
H Code 1958 (Cap 81), the primary statute to make better provision in the law relating to land and at the same time ensuring the continued existence of native customary land, left the NCR unscathed. (paras 28-31)

I **(2)** The creation of native customary land and rights acquired by a native of Sarawak, is conditional upon the adherence to custom or common practice of his community. For an Iban,

it has the customary concept of *Tusun Tunggu* whereby NCR could be acquired by two modes. For the first mode, the common thread is that the acquisition of NCR starts with the clearance of the said untitled virgin land or jungle by a native, followed by the occupation of the cleared land and thereafter not allowing the land to be abandoned. Once abandoned, whatever NCR was created or acquired previously over that land would be lost. If the original owner abandoned the land without more, the community takes over. (paras 37 & 38)

(2a) Even though native customary land remains as State land, with such rights acquired being considered as individual rights, after his death that land may be inherited. The appellant certainly could not inherit those eight lots as he was not an heir to the vendors. An original owner of native customary land who had no heir, may circumvent the loss of such NCR over the land by passing that land to some other person within the community, subject to him handing over the original owner what was traditionally called *tungkus asi*. The *tungkus asi* is a form of token (tanda) symbolising the transfer of rights of the cleared land to the new owner. This token is customarily of little value, perhaps fetching the value of a pig, usually handed over in front of the head of the community. The appellant, though an Iban, would fail to qualify as a legitimate recipient of the *temuda* from the vendors as he was not a native of that community. (para 38)

(3) The novel argument that the S&Ps would fall under the phrase of "any other lawful method" which was only concerned with the newly created NCR as provided for under s. 5(2)(f) of the Sarawak Land Code 1958 (Cap 81), must equally fail by virtue of those eight lots being native customary land created prior to 1 January 1958. Further, there was no hint of any provision in Cap 81 that legitimised any transfer of pre 1 January 1958 acquired NCR through the mode of S&Ps. Such a drastic change that drifts away from established native customary law require express and clear language in Cap 81 (*Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh*, refd). (para 39)

(4) With the ineligibility of the appellant to inherit or acquire through the *tungkus asi* procedure, and the litany of case laws (*Sat Ak Akum & Anor v. Randong Ak Charareng*, refd;

A *Sumbang Ak Sekam v. Engkarang Ak Ajah*, refd), it was established that individual customary rights were not transferable by sale or otherwise for value, thus invalidating the S&Ps. The position of the appellant was therefore tenuous. With the S&Ps being in contravention of customary
B land law in force immediately prior to 1 January 1958, the answer to questions (i)(a) and (b) therefore must be in the negative. (para 40)

(5) The appellant in his pleadings stated that the eight lots were
C located in the native area land whilst this question pertained to native communal reserve, an area which had no bearing over the disputed properties. Thus, there was no necessity to answer question (ii). Further, the appellant's case rested on conditional sale and purchase agreements, and the express
D conditions were never fulfilled thus rendering the S&Ps void and ineffective. (paras 41 & 42)

Per Richard Malanjum CJ (Sabah & Sarawak) (concurring):

(1) Native customary land ('NCL') is intended for the upkeep and
E survival of the inhabitants of each longhouse community. There is no element of commercial enterprise involved. NCL does not stand on the same footing as titled land alienated under the Sarawak Land Code ('SLC'). Recognition of NCL and the rights and interests arising therefrom are premised on
F common law principle (*Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh*, refd). As such, adat and customs of the natives and that includes the Ibans in this case were very relevant in the creation and existence of NCL. (paras 66-68)

G

(2) Being a licensee, an occupier of NCL is expected to use the NCL within the terms of his 'license'. The adat and customs of the Iban community are part and parcel of the license. Moreover, as a mere licensee, he has no title to sell. Being
H part of the land, a native is not in a position to sell any interest in the land for he is but a mere trustee of the land for his next generation. There has never been in existence any adat or custom that allows a 'holder' of NCL to part with it by way of sale. (paras 69, 70 & 73)

I

(3) If 'holders' of NCL were or are allowed to dispose them off by way of sale, then the very purpose in the creation and existence of NCL would be defeated. The native adat and

custom of *tungkus asi* would be greatly undermined. Hence, if, to begin with, there was no adat and custom on transfer of NCL by way of sale, the question of extinguishment did not arise. The promulgation of the said Order by the Rajah did not encapsulate any prior existing prohibitory adat or custom on sale of NCL. Rather, the said Order was a clear indication on the absence of a permissive adat and custom on sale of NCL. Accordingly, there was no necessity to answer question (i) and question (ii) was answered in the negative. (paras 75, 77 & 80)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang yang berbangsa Iban/Dayak Laut dan berasal dari Sarawak, telah memfailkan writ saman di Mahkamah Tinggi menuntut pengisytiharan-pengisytiharan terhadap responden-responden yang melibatkan tiga bidang tanah. Perayu memplidkan bahawa dia telah memperolehi hak tanah adat ('HTA') ke atas tiga bidang tanah tersebut melalui perjanjian jual beli ('PJB') dan melalui gabungan adat dan langkah perundangan lain. Bidang tanah pertama terdiri daripada lapan lot yang dibeli di bawah lapan PJB yang berlainan daripada lima pemilik benefisial HTA yang telah memperolehi HTA melalui tanah adat Iban sebelum 1 Januari 1958. Perayu memplid bahawa dia telah menduduki dan bercucuk tanam secara berterusan di lapan lot tanah itu. Perayu juga memplid bahawa melalui pendudukannya dan penanamannya yang kekal dan berterusan ke atas bidang tanah pertama tersebut, serta dengan bidang tanah kedua, bersama-sama dengan hak-hak yang diberi untuk mengekstrak kayu balak daripada bidang tanah ketiga, dia telah memperolehi HTA ke atas tanah-tanah itu. Pengisytiharan-pengisytiharan yang dituntut oleh perayu adalah, antara lain, bahawa dengan pengambilalihan HTA, responden-responden terhalang daripada merosakkan hak-hak perayu ke atas ketiga-tiga bidang tanah tersebut. Perayu memplid bahawa dua isu dokumen hakmilik telah dikeluarkan bagi dua kawasan yang dikenali sebagai Lot-Lot 85 dan 86 kepada responden keempat oleh responden-responden pertama dan kedua. Kawasan-kawasan Lot-Lot 85 dan 86 meliputi atau termasuk bahagian-bahagian ketiga-tiga bidang yang dituntut oleh perayu termasuk lapan lot yang diperolehi melalui PJB tersebut. Perayu mendakwa bahawa HTA ke atas tanah-tanah tersebut telah terjejas dan kemasukan dua isu dokumen tersebut adalah tidak sah dan terbatal, tidak teratur dan menyalahi undang-undang kerana tiada penghapusan terlebih dahulu HTA perayu telah berlaku. Mahkamah Tinggi menolak

A tuntutan-tuntutan perayu untuk pengisytiharan dan perintah-perintah berbangkit. Pesuruhjaya Kehakiman ('PK') mendapati bahawa dakwaan perayu berkenaan pengambilalihan HTA adalah melalui transaksi jual beli biasa dan juga berpendapat bahawa HTA tidak boleh dipindah milik kepada pihak lain melalui cara tersebut. B Mahkamah Rayuan, dalam menolak rayuan perayu, selanjutnya memutuskan bahawa ia terikat secara undang-undang untuk menggunapakai pengiktirafan kehakiman undang-undang adat yang ditubuhkan oleh Mahkamah Rayuan Anak Negeri terutamanya prinsip HTA yang telah diwujudkan atau diperolehi oleh anak-anak C negeri melalui amalan adat resam mereka, dengan hak-hak sebegitu tidak boleh dipindahmilik untuk nilai kepada orang lain di luar komuniti atau daerah. Mahkamah Persekutuan memberi kebenaran kepada perayu untuk merayu berdasarkan persoalan-persoalan ini: (i) sama ada adat atau kastam bahawa "hak-hak adat secara D individu boleh dipindahmilik melalui jualan atau sebaliknya untuk nilai" yang dirujuk dan digunapakai dalam *Sumbang Ak Sekam v. Engkarang Ak Ajah* telah berakhir dan berkuatkuasa berdasarkan: (a) atas enakmen yang sama seperti undang-undang di bawah s. 2 Fruit Trees Order 1889 Perintah Rajah; dan/atau (b) atas E pemansuhan berikutnya Perintah Rajah tersebut; dan (ii) sama ada menurut s. 6 Kanun Tanah Sarawak, adat hanya terpakai ke atas tanah yang diwartakan sebagai rizab kaum asli.

Diputuskan (menolak rayuan dengan kos)

F **Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:**

(1) Sebagai seorang Iban, peruntukan s. 2 Fruit Trees Order 1889 terpakai ke atas perayu. Fruit Trees Order 1889 hanya mengesahkan kewujudan sistem dwi tanah, iaitu, satu G tertakluk kepada geran dan satu lagi tidak. Secara tafsiran, di bawah sistem di mana seorang Dayak mempunyai geran, ia membolehkannya menuntut, menjual atau memindah milik mana-mana tanah pertanian di sungai atau daerah, kepada pihak lain. Di bawah sistem yang satu lagi, di mana seorang H Dayak tidak mempunyai geran, iaitu, tanah tak bermilik dan biasanya terpakai kepada tanah adat, dia tidak boleh menuntut, menjual atau memindah milik mana-mana tanah pertanian di sungai atau daerah. Sama ada s. 2 Fruit Trees Order 1889 telah digubal atau dimansuhkan seterusnya tidak I mendatangkan perbezaan ke atas tanah adat atau undang-undang dan hak-hak yang dilampirkan kepadanya kerana penguatkuasaannya dijamin. Enakmen kemudiannya Kanun

Tanah Sarawak 1958 (Cap 81), statut asas yang membuatkan peruntukan yang lebih baik dalam undang-undang berhubung tanah dan pada masa yang sama memastikan kewujudan berterusan tanah adat, tidak menjejaskan HTA. A

(2) Pembentukan tanah adat dan hak-hak yang diperolehi oleh seorang yang berasal dari Sarawak, adalah tertakluk kepada pematuhan adat atau amalan biasa masyarakatnya. Bagi seorang Iban, ia mempunyai konsep adat *Tusun Tunggu* di mana HTA boleh diperolehi melalui dua cara. Melalui cara pertama, aliran yang dipersetujui adalah pengambilalihan HTA bermula dengan pembersihan tanah dara yang tidak dimiliki atau hutan oleh seorang anak negeri, diikuti dengan pendudukan tanah yang telah dibersihkan dan seterusnya tidak meninggalkan tanah tersebut. Sekali ditinggalkan, apa-apa HTA yang telah dibentuk atau diperolehi sebelum ini ke atas tanah tersebut akan hilang. Jika pemilik asal telah meninggalkan tanah tersebut, masyarakat akan mengambil alih. B C D

(2a) Walaupun tanah adat kekal sebagai Tanah Negeri, dengan hak-hak yang telah diperolehi dianggap sebagai hak individu, selepas kematian seorang individu itu, tanah tersebut boleh diwarisi. Perayu tidak boleh mewarisi lapan lot tersebut kerana dia bukan pewaris kepada penjual-penjual. Pemilik asal tanah adat yang tidak mempunyai waris, boleh mengelakkan kehilangan HTA ke atas tanah tersebut dengan memberikannya kepada orang lain dalam masyarakat yang sama, tertakluk kepada pemberian apa yang dipanggil secara tradisional *tungkus asi* kepada pemilik asal. *Tungkus asi* adalah satu bentuk tanda yang melambangkan pindah milik hak-hak tanah yang telah dibersihkan kepada pemilik baru. Tanda ini tidak mempunyai nilai yang tinggi, ia mungkin boleh disamakan dengan nilai seekor babi, yang biasanya diserahkan di hadapan ketua masyarakat. Perayu, walaupun seorang Iban, gagal melayakkan dirinya sebagai penerima yang sah *temuda* daripada penjual-penjual kerana dia bukan seorang anak negeri yang berasal daripada masyarakat itu. E F G H

(3) Hujahan bahawa PJB boleh terjumlah di bawah frasa "any other lawful method" yang hanya berkaitan dengan HTA yang baru dicipta seperti yang diperuntukan di bawah s. 5(2)(f) Kanun Tanah Sarawak 1958 (Cap 81), sewajarnya gagal kerana lapan lot tersebut adalah tanah adat yang I

dicipta sebelum 1 Januari 1958. Selanjutnya, tidak terdapat peruntukan dalam Cap 81 yang mengesahkan apa-apa pindahmilik HTA yang diperolehi sebelum 1 Januari 1958 melalui PJB. Perubahan mendadak sebegitu yang terpesong daripada undang-undang adat yang telah ditubuhkan memerlukan bahasa yang jelas dan terang dalam Cap 81 (*Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh*, dirujuk).

(4) Dengan ketidaklayakan perayu untuk mewarisi atau memperolehi melalui prosedur *tungkus asi*, dan berdasarkan beberapa kes undang-undang (*Sat Ak Akum & Anor v. Randong Ak Charareng*, dirujuk; *Sumbang Ak Sekam v. Engkarang Ak Ajah*, dirujuk), adalah dibuktikan bahawa hak-hak adat tidak boleh dipindahmilik melalui jualan atau sebaliknya untuk nilai, dengan itu membatalkan PJB. Oleh itu, kedudukan perayu adalah lemah. Dengan PJB yang telah melanggar undang-undang adat yang berkuatkuasa sebelum 1 Januari 1958, jawapan kepada persoalan i(a) dan (b) adalah negatif.

(5) Perayu dalam plidingnya menyatakan bahawa lapan lot tersebut terletak di kawasan tanah asli manakala soalan ini berhubungan dengan rizab kaum asli, sebuah kawasan yang tiada kaitan dengan tanah-tanah yang dipertikaikan. Oleh itu, tiada keperluan untuk menjawab persoalan (ii). Tambahan lagi, kes perayu bergantung pada perjanjian jual beli bersyarat, dan syarat-syarat yang dinyatakan tidak dipenuhi, dengan itu menjadikan PJB tidak sah dan tidak berkesan.

Oleh Richard Malanjum HB (Sabah & Sarawak) (menyetujui):

(1) Tanah adat ('TA') bertujuan untuk penyenggaraan dan kehidupan penduduk-penduduk setiap masyarakat rumah panjang. Tiada unsur perusahaan komersial terlibat. TA tidak berdiri atas landasan yang sama dengan tanah berhakmilik yang diasingkan di bawah Kanun Tanah Sarawak ('KTS'). Pengiktirafan TA dan hak-hak serta faedah-faedah yang timbul daripadanya adalah berdasarkan prinsip undang-undang lazim (*Superintendent of Land & Surveys Miri Division & Anor v Madeli Salleh*, dirujuk). Dengan itu, adat dan kastam anak-anak negeri yang merangkumi kaum Iban di dalam kes ini adalah sangat relevan dalam penciptaan dan kewujudan TA.

(2) Sebagai pemegang lesen, seorang penghuni TA dijangka menggunakan TA mengikut terma-terma 'lesen' itu. Adat dan kastam masyarakat Iban adalah sebahagian daripada lesen itu. Lebih-lebih lagi sebagai pemegang lesen, dia tidak mempunyai hakmilik untuk menjual. Sebagai sebahagian tanah itu, seorang anak negeri tidak mempunyai kedudukan untuk menjual haknya dalam tanah itu kerana dia hanyalah pemegang amanah tanah untuk generasi yang akan datang. Tiada dalam kewujudan apa-apa adat atau kastam yang membenarkan 'pemegang' TA melepaskannya dengan cara jualan.

(3) Jika 'pemegang' TA dibenarkan untuk melupuskannya melalui jualan, maka tujuan mencipta dan mewujudkan TA akan ditewaskan. Adat asli dan kastam *tungkus asi* akan terjejas. Oleh itu, jika, dari mula lagi, tiada adat atau kastam berkenaan pindahmilik TA melalui jualan, persoalan penghapusan tidak timbul. Pengisytiharan perintah tersebut oleh Rajah tidak merangkumi apa-apa adat atau kastam yang sedia ada wujud berkenaan jualan TA. Sebaliknya, perintah tersebut adalah satu petunjuk jelas ketiadaan adat dan kastam permisif berkenaan jualan TA. Oleh itu, tiada keperluan untuk menjawab soalan (i) dan soalan (ii) dijawab secara negatif.

Case(s) referred to:

Abang v. Saripah [1969] 1 LNS 2 CA ***(refd)***

Agi Ak Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 1 LNS 114 HC ***(refd)***

Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169 HC ***(refd)***

Madeli Salleh v. Superintendent of Lands & Surveys & Anor [2005] 3 CLJ 697 CA ***(refd)***

Masa Anak Nangkai & Ors v. Lembaga Pembangunan Dan Lindungan & Ors [2011] 1 LNS 145 HC ***(refd)***

Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 HC ***(refd)***

Sapiah Mahmud v. Superintendent of Lands and Surveys Samarahan Division & Ors [2009] 9 CLJ 567 HC ***(refd)***

Sat Ak Akum & Anor v. Randong Ak Charareng [1958] SCR 104 ***(refd)***

Sumbang Ak Sekam v. Engkarang Ak Ajah [1958] SCR 95 ***(refd)***

Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal [2005] 3 CLJ 555 CA ***(refd)***

Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Legislation referred to:
Federal Constitution, art. 161A(7)
Fruit Trees Order 1889, s. 2
Sarawak Land Code 1958, ss. 2, 4(1), (4), 5(1), (2)(ii), (f), (3), 6, 10(4)

Other source(s) referred to:
Lee Hun Hoe, *Cases on Native Customary Law in Sarawak*, p 144
AF Porter, *The Development of Land Administration in Sarawak from the Rule of Rajah James Brooke to the Present Time (1841-1965)*, pp 16 & 18

For the appellant - Mekanda Singh Sandhu (Kalveet Singh Sandhu with him); M/s Sandhu & Co
For the 1st & 2nd respondents - JC Fong (Saferi Ali & Mohd Adzrul Adzlan with him); State AG's Chambers
For the 3rd respondent - Abang Halit Abang Malik; M/s Loke, King, Goh & Partners
For the 4th respondent - Bexter Michael; M/s Ee & Lim Advocates

[Editor's note: For the Court of Appeal judgment, please see Bisi Jinggot v. Superintendent Of Lands And Surveys Kuching Division & Ors [2013] 6 CLJ 42.]

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] On 9 April 2012 the Federal Court granted the plaintiff, hereinafter referred to as the appellant, leave to appeal on three questions. On the day of the appeal the appellant invited us to determine only two questions, and they are:

(i) Whether, the alleged adat or custom that "individual customary rights are not transferable by sale or otherwise for value" referred to and applied in *Sumbang Ak Sekam v. Engkarang Ak Ajah* [1958] SCR 95 ceased to exist and enforceable as such:

(a) upon enactment of the same as law under s. 2 of the Fruit Trees Order 1889, of the Rajah; and/or

(b) upon the subsequent repeal of the said Rajah's Order?

(ii) If the answers to question (1) above are in the negative, whether, by virtue of s. 6 of the Land Code, the alleged adat or custom applies only to land gazetted as native communal reserve?

Antecedent And Facts Of Appeal

[2] The appellant being an Iban and/or sea Dayak by race, thus a native of Sarawak, filed a writ of summons at the High Court of Sabah and Sarawak seeking declarations against the four respondents (defendants) involving three parcels of land. He pleaded that he had acquired native customary rights (NCR) over the said three parcels of land through eight sale and purchase agreements (S&Ps) and through a mixture of customary and other legal means. The following are the details of the transactions regarding these parcels of land and court action.

[3] The first parcel of land comprise eight lots bought under eight different S&Ps from five different NCR beneficial owners who had acquired the NCR by means of Iban's customary land law prior to 1 January 1958. Five lots (Lots 7, 9, 35, 36 and 43) were bought on 8 December 1984, two lots (Lots 3 and 29) were bought on 29 October 1990 and one lot (Lot 2) was bought on 10 July 1991. The appellant pleaded that he had continuously occupied and cultivated those eight lots of land. As per the pleadings the appellant stated that the eight lots had been gazetted as native area land.

[4] The second parcel is lot 34 measuring 2.94 acres and likewise had been cultivated by him as early as 1986. He said he was the first person to cultivate this lot in 1986 under the Cocoa Scheme and later under the SEDC adoption scheme for cattle farming in 1991.

[5] The third parcel measuring 34 acres comprised three lots (Lots 1, 2 and 3) of land. This parcel was given to him through his wholly owned company by the Forest Department of Sarawak on 7 of September 1993 *vide* a Letter of Authority No. 6/93. He was permitted to extract logs or timber from this parcel.

[6] The appellant also pleaded that he was given the understanding and or guarantee by the first respondent that if ever titles were issued for all the three parcels he would be the recipient of the issued titles. He also pleaded that by his continuous occupation and cultivation of the two parcels, together with the rights given to extract timber from the third parcel, he had acquired NCR over them.

A **The Prayers In The Statement Of Claim**

[7] We now touch on the prayers pleaded in the statement of claim. His first prayer was for a declaration that he acquired NCR over the said three parcels of land either collectively or separately. B Collectively all the 12 lots would fall under this first prayer. The second declaration prayed for was that with the acquisition of the NCR all the respondents were precluded from impairing his rights over the three parcels of land. The third declaration was for an alleged infringement of his rights over all the three parcels of land. C He pleaded that on or about April 1993 two issue documents of title were issued for two areas known as Lots 85 and 86 in favour of the fourth respondent by the first and second respondents. The areas of Lots 85 and 86 covered or included portions of all three parcels claimed by the appellant inclusive of the eight lots D obtained *vide* the eight S&Ps. He claimed that his NCR over the lands had been impaired and their inclusion in the two issue documents was null and void, irregular and unlawful as no prior extinguishment of his NCR had ever taken place. As against the third respondent the appellant claimed that the Chief Scout E Commissioner of Sarawak trespassed over those plots of land causing damage and hence entitled to damages. The rest of the prayers were consequential prayers.

Defence Of The Respondents

F **[8]** The respondents in their respective defences took the collective stance that the appellant had not acquired NCR over the first parcel of land through the S&Ps. With no NCR created or acquired prior to 1 January 1958 over the impugned lands no NCR could have been transferred to the appellant.

G

[9] As regards the second parcel the respondents replied that any activity carried out over that land was done without any lawful authority. Pertaining to the third parcel, the respondents agreed that a letter of authority (6/93) was indeed issued on H 7 September 1993 permitting the appellant to extract forest produce on that parcel of land but by 6 February 1994 the document had expired, causing further extraction of forest produce illegal.

I **[10]** Further the respondents denied the existence of any understanding that the appellant would be issued with titles over the three parcels of land in the event titles were issued. Additionally, the fourth respondent fielded the defence that by the

issuance of the documents of title it had acquired an indefeasible title over Lots 85 and 86, which included the eight lots located in the first parcel.

[11] Alternatively the learned state legal counsel for the first and second respondents also submitted that the appellant's case rested on conditional sale and purchase agreements (see para 8 statement of claim) as a basis for his alleged acquisition of NCR over the parcels of land; the condition precedent being that the Sarawak Government would first alienate the lands to the vendors. And since this express condition was never fulfilled the S&Ps were thus rendered void and ineffective.

The High Court's Decision

[12] On 30 April 2008, the High Court dismissed the appellant's prayers for the declaratory and consequential orders. Dr Hamid Sultan JC found that the appellant was not alleging that the acquisition of the NCR, whether by himself or his father was by the clearance, cultivation, occupation of the land or inheritance undertaken by them, but pursuant to ordinary sale and purchase transactions.

[13] The learned JC opined that NCR could not be transferred to another person by such means. In the course of dismissing the action the learned JC said:

> A native customary right can only be transferred in a limited sense like by gift or inheritance, within the community members of the native. That means, a native at south Sarawak cannot purchase the native customary rights from a native at north Sarawak. The nexus must be within the community and not within the race. For courts to recognize any such transfer it must be legislated.
>
> (i) The appellant did not also acquire native customary rights under the Sarawak Land Code.

The Court Of Appeal's Decision

[14] Being dissatisfied the applicant appealed to the Court of Appeal. This court affirmed the Iban's customary concept of *Tusun Tunggu*, that an NCR could only be acquired by two modes namely by felling a virgin jungle and planting crops to create *temuda*, and secondly by gift or inheritance. The Court of Appeal further held the view that it was legally bound to take judicial

notice of the customary law established by the native Court of Appeal in Sarawak particularly the NCR principle having been created or acquired by natives through the practice of their customs, with such rights not transferable for value to someone else outside the community or district. On 10 December 2010, the Court of Appeal unanimously dismissed the appeal.

[15] The appellant then successfully obtained leave to appeal to the Federal Court hence the matter before us.

Concessions Made By The Parties

[16] In the course of the proceedings before us the appellant and the respondents made a few concessions. The appellant conceded that he was restricting his appeal to the eight lots comprising the 37.24 acres bought through the S&Ps, as reflected in para 1.3 of the appellant's written submission and confirmed later in open court. By this concession the appellant had abandoned his claim to the other four lots, respectively Lot 34 in the second parcel and Lots 1, 2, and 3 in the third parcel allegedly covered by the letter of authority. His appeal thus was limited to the alleged NCR obtained through the eight S&Ps.

[17] Learned counsel for the respondents in the course of his submission conceded that the eight lots transacted in the eight S&Ps were indeed native customary land at the time of their execution. By such concession the eight lots will be subject to native customary law, and the need to discuss lengthily whether they are located in a native area land as pleaded, or the creation of the NCR was properly undertaken, become unnecessary. With the lots having been acquired by the vendors prior to 1 January 1958, as pleaded in the statement of claim, the rights acquired will be subject to customary law in force prior to that date. Lee Hun Hoe J in *Rampai ak Chunggat v. Langau ak Chandai & Superintendant of Lands and Surveys, Third Division, Sibu* (in *Cases on Native Customary Law in Sarawak* p. 144) had distinctly said:

> But rights acquired prior to 1958 will be decided according to law in force prior to 1958 ...

[18] Notwithstanding the concession, the respondents stood their ground that as the transactions had not adhered to native customary law, and with indefeasible title having been acquired by the fourth respondent, the appellant's position had become untenable.

Our Analysis

[19] Despite the contentious facts having been drastically reduced and the issues simplified, contributed in no small way by the concessions, the need to discuss the current position as regards customary land and the acquired NCR in Sarawak must still be undertaken.

[20] We will begin with the unchallenged evidence adduced by the appellant through a witness in court. At pp. 186-187 RR part B vol. 1, Nicholas Bawin ak Anggat, an Iban and the former Deputy President of the Majlis Adat Istiadat Sarawak, amongst others said:

> As a general rule, the household within the community that first felled the forest secured rights over specific pieces of land. These rights are heritable, passing ideally from generation to generation of households members ...
>
> Rights to a piece of land is lost if it is transferred to another person, for example a sibling, a cousin or a relative. It can also be lost if the person moves to another villages through marriages or migration (pindah).
>
> The adat on pindah is quite clear on depriving one's rights to customary land. For instance, section 73 of the Adat Iban 1993 stipulates that whoever moves from one longhouse to another shall be deprived of all rights to untitled land or any customary land that has not been planted with crops and all such lands shall be owned in common by the people of the longhouse.
>
> There is no adat on sale of customary land. If a person pindah from the longhouse, rights to customary land will either go to the community or he can transfer such rights to a cousin or relative who will in turn provide him with *tungkus asi*.
>
> *Tungkus asi* refers to the token provided by the recipient to the person who on account of his moving from the longhouse to another transfers rights of his customary land to the recipient.

[21] There is marked similarity in the above explanation regarding customary land law as discussed in case laws with the law in force prior to 1 January 1958. To illustrate, in *Abang v. Saripah* [1969] 1 LNS 2; [1970] 1 MLJ 164, the Native Court of Appeal of Sarawak when considering the factual question in issue of whether the appellant or the respondent was entitled to a piece of *temuda* land, at the same time had discussed Sarawak's native customary law in some detail. Briefly and simply put, *temuda* land is untitled

A virgin land cleared by a native whereupon he acquires some restricted right of proprietorship over that cleared land to be used by him. Once it is cleared it becomes *temuda*. In this case of *Abang v. Saripah* the land was originally cleared by the respondent but subsequently abandoned for more than 20 years. The appellant B wanting to claim the contested land alleged that he bought that *temuda* land from the respondent's brother-in-law. BTH Lee J who sat with two other assessors in the Native Court of Appeal agreed with the decision of the Resident's Native Court and dismissed the appeal. This Native Court of Appeal held that not C only did the respondent lose her rights to the land when moving away (pindah) to another district (let alone without any right or power to alienate it), but the appellant likewise on the facts of the case could not claim NCR over it. In the course of it, the learned judge at p. 165 stated the following:

D

> I do not find it necessary to discuss the point at great length. The law is to be found in the following passage from Native Customary Laws Ordinance (Cap. 51) Vol. VII Sarawak Law Appendix 'A' para 7 at page 636.
>
> E Theoretically all untitled land whether jungle or cleared for padi farming (*temuda*) is the property of the Crown. The fact that Dayaks do clear a portion of virgin land for the site of their padi farm confers on them a restricted right of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes '*temuda*'. It is a recognized F custom that '*temuda*' is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance ... No Dayak is allowed to sell, purchase or lease (by way of demanding rent either in kind or in cash) untitled land. It would be an infringement of the right of the Crown if they G did so, and they may be prosecuted in view of the fact that selling of untitled land is prevalent in this division, and Dayaks seem to forget this custom.
>
> There are no other ways in which Dayaks can part with possession of untitled land other than by gift or on death. H When a Dayak abandons his land *'temuda'* and moves to another district he loses all his rights to it. The land that has been farmed by him reverts to the Crown (as legally it is Crown land) and it is usually set aside for the benefit of the general community or to help those who are otherwise I lacking in land. In such a case the original owner has no right to prevent others from making use of the land and the user acquires the rights.

> This was made clear by the Rajah's order dated 10th August 1899 Land Tenure Act ...

[22] Another succinct elucidation was given by the Native Court of Appeal, the highest court in the Native Court system in Sarawak, in *Sat Ak Akum & Anor v. Randong Ak Charareng* [1958] SCR 104 when it said in the following manner:

> *Temuda* rights are created by felling the old jungle and cultivating the land, and are created only for the use of original worker, his heirs and descendants. They certainly cannot be transferred for value.
>
> ... The owner leaving the district without any heir may arrange for someone else to have prior right to farm that land by taking from him what is called *tungkus asi*, which is some form of token to bind the agreement. It may not be anything of value, which would invalidate the transaction, but may consist of as much as a pig. The rights taken over by the person paying the *tungkus asi* are inheritable by the heirs of the person but revert to the original owner if he returns or to his heirs if they return.

[23] Another case for illustration, and incidentally part of the question for our determination, is *Sumbang Ak Sekam v. Engkarang Ak Ajah* [1958] SCR 95. This case not only discussed the customary law of a native in order to obtain NCR, but also deliberated on the issue of whether such right could be transferred for value. The matter was heard by the Native Court of Appeal of Sarawak, *via* case stated by the presiding Magistrate who had earlier heard the appeal from the Resident's Native Court. The facts of the case are as follows. Guyu, a Dayak who stayed in a longhouse cleared, cultivated and occupied a piece of land but later decided to move to Bintulu. Before leaving he handed over his land and rights to Perada, who in return gave Guyu what is called *tungkus asi*. Despite having obtained this right Perada failed to use the land. Later this land, which was still without a title, became part of the mixed zone. The appellant ie, *Sumbang Ak Sekam* then desired not only to be declared the holder of the customary rights over the land but also the one to be given the right to a mixed zone title.

[24] When the matter went before the Resident's Native Court, it found that Guyu had contractually sold the land to Perada, and proceeded to hold that the *tungkus asi* was actually a sale price for the land. In a nutshell it was a commercial deal and that Perada had bought the land from Guyu. The Native Court of Appeal of Sarawak presided by Lascelles J thought otherwise.

A Before arriving at a factual finding Lascelles J had to contend with three points of native law or custom for decision, one of which is on point with this current appeal ie, whether individual rights are transferable by sale or otherwise for value. The learned judge in the course of disagreeing with the Resident Native Court, after
B going through the facts, held the view that the heirs of Perada still held full customary farming rights and entitled to apply for title over the land.

[25] Lascelles J explained that *tungkus asi* could be best
C interpreted as a customary tanda or token and not a purchase price. He further explained that:

> In former days this was something of little value, supposed to represent a meal which might reach the level of a pig and was usually handed over in front of Tuai Rumah.

D

[26] The learned judge declared that as the *tungkus asi* received from Perada by Guyu was a mere token, it could not be regarded as a sale of the property. At p. 96 of the case, he made the statement under scrutiny before us, when he said:

E

> In the Court's opinion ... Individual customary rights are not transferable by sale or otherwise for value.

[27] The above statement posed for our determination, of whether individual customary rights are not transferable by sale or
F otherwise for value ceased to exist and become unenforceable upon the enactment and subsequent repeal of the Fruit Trees Order 1889 of the Rajah Order, requires discussion of like orders. The Rajah's Orders, precursors to written and structured forms of Sarawak land law which included the recognition of Sarawak's
G land customary law, culminating in the Sarawak Land Code 1958 (Cap 81) made matters clearer. Skinner J (as he then was) in *Madeli Salleh v. Superintendant of Lands & Surveys & Anor* [2005] 3 CLJ 697 had occasion to discuss the Rajah's Order 1X 1875 which directed that any person who made clearings of old jungle
H but subsequently allowing the same to go uncared would lose all claim or title over such land. Such reference in Order 1X 1875 according to the Court of Appeal, of losing all claims over the uncared land, was clear recognition of such native custom of acquisition of NCR over land. This decision was approved by the
I Federal Court later (see *Superintendant of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509). We see no

reason to disagree with the view held by the Court of Appeal of the clear recognition of acquisition of NCR, also confirmed by the Fruit Trees Order 1889 particularly s. 2. This provision reads:

> Any Dayak removing from a river or district may not claim, sell or transfer any farming ground in such river or district, nor may he prevent others, farming thereon, unless he holds such land under a grant ...

[28] Before proceeding further some clarification is required on the applicability of this provision on the appellant who is an Iban. The above section speaks of Dayaks. Under art. 161A (7) of the Federal Constitution the definition of natives include Sea Dayaks and Land Dayaks. Under the Sarawak Interpretation Ordinance 2005 found in the schedule again the Dayaks are split into two, namely the Land Dayaks (Bidayuh) and the Sea Dayaks or Ibans. The Sea Dayaks and Ibans are one and the same indigenous race who are natives of Sarawak. As the Order of 1889 speaks of any Dayak regardless of whether a Land Dayak or Sea Dayak, being an Iban the above provision of s. 2 would therefore apply on the appellant.

[29] This Fruit Trees Order 1889, which did not legislate in any way that it was replacing the native customary law, merely confirmed the existence of a dual system of land ie, one subject to grant and the other not. Interpretatively under the system where a Dayak has a grant he could claim, sell or transfer any farming ground in such river or district, to others. Under the other sisterly system, where the Dayak has no grant ie, untitled land and invariably applicable to customary land, he may not claim, sell or transfer any farming ground in such river or district, nor may he prevent others, farming thereon. Section 2 says nothing about preventing a Dayak having acquired NCR, handing down that right to another native, subject to the adherence of all the tenets of customary land law.

[30] In short whether s. 2 of the Fruit Trees Order 1889 was enacted or repealed subsequently made no difference to native customary land or of the law and rights attached to it as its subsistence is guaranteed. Haidar J in *Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors* [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169; [1990] 3 MLJ 427 at 432 succinctly said:

> As such it would appear that native customary rights whether communal or otherwise are recognized by the law i.e. the Land

A Code of Sarawak (Cap 81) (see ss. 5 and 15 of the Land Code). In other words if native customary rights were established as at 1 January 1958 such rights shall subsist.

[31] The subsequent enactment of the Sarawak Land Code 1958 (Cap 81), the primary statute to make better provision in the law B relating to land and at the same time ensuring the continued existence of native customary land, brought major changes but leaving the NCR unscathed. As an example, under Part II of Cap 81 the Minister may by order signified in the Gazette declare any area of land to be native area land or interior land. The Minister C is also empowered to declare any area of land to be Mixed Zone and any native area land or interior land located within such area shall be part of the mixed zone s. 4(1). Even the Director of Land and Surveys may, with the approval of the Minister by notification in the gazette, declare any such area as native area land, inclusive D of interior area land located in that declared area. Despite these statutory powers to classify land, s. 4(4) of Cap 81 states clearly that no native customary land shall be affected by the above declarations made by the Minister or Director of Lands and Surveys, unless any part thereof may subsequently cease to be E native customary land. Section 4(4) reads:

> Where the area in respect of which a declaration has been made under subsection (1), (2) or (3) comprises Native Customary Land, such land shall be unaffected by the declarations ...

F

[32] Under s. 2 of Cap 81 native customary land includes land on which NCR, whether communal or otherwise, have lawfully been created prior to 1 January 1958. In a gist NCR created prior to 1 January 1958, which does not owe its existence to G statutes, is statutorily protected and continues to subsist under s. 4(4) regardless of any declarations (see also *Sapiah Mahmud v. Superintendant of Lands and Surveys Samarahan Division & Ors* [2009] 9 CLJ 567).

[33] Apart from ensuring the subsistence of NCR already in H existence prior to 1 January 1958, Cap 81 also provides for the creation of new NCR after 1 January 1958 on interior area land, but subject to a permit (ss. 5(1) and 10(4). Under s. 5(2) the methods by which the new NCR may be acquired are:

I (a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine; or

(e) the use of land of any class for right of way; or

(f) any other lawful method.

[34] The newly created NCR may be subject to extinguishment by direction of the Minister upon adherence of certain statutory requirements s. 5(3). Section 5(2)(ii) of Cap 81 is highly relevant if any extinguishment exercise of the new NCR is undertaken. It reads:

> the question whether any such right has been acquired or has been lost or extinguished shall, save as in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958.

[35] In simple terms, in the event any acquisition of new NCR comes under scrutiny, or whether subsequently lost, or extinguished shall be determined by the law in force immediately prior to the first day of January, 1958. This provision therefore does not differentiate the treatment of the newly created NCR and rights acquired prior to 1 January 1958 (see *Rampai ak Chunggat v. Langau ak Chandai & Superintendant of Lands and Surveys, Third Division, Sibu (supra)*.

[36] Additional to the newly created NCR, is the creation of native communal reserves under s. 6 of Cap 81 whereupon the Minister may order and declare any area of State land for the use of any community having a native system of personal law. Rights in that native communal reserve shall be regulated by the customary law of the community for whose use it was declared to be reserved. Not unlike newly created NCR in interior area land, the Minister may by order signified in the gazette declare any part of the native communal reserve to cease being part of it.

Our Decision

[37] From the totality of evidence and authorities referred in the course of the hearing, we are satisfied that the creation of native customary land and rights acquired by a native of Sarawak, is conditional upon the adherence to custom or common practice of his community. For an Iban, it has the customary concept of *Tusun Tunggu* whereby NCR could be acquired by two modes

A namely clearing untitled virgin jungle enroute to the creation of what is locally described as *temuda* and the other by receiving the *temuda* as a gift or inheritance. For the first mode, the common thread is that the acquisition of NCR starts with the clearance of the said untitled virgin land or jungle by a native, followed by the
B occupation of the cleared land and thereafter not allowing the land to be abandoned. Once abandoned whatever NCR was created or acquired previously over that land would be lost. If the original owner abandons the land without more the community takes over.

C **[38]** Even though native customary land remains State land, with such rights acquired being considered as individual rights, after his death that land may be inherited. The appellant certainly cannot inherit these eight lots as he is not an heir to the vendors. An original owner of native customary land who has no heir, may
D circumvent the loss of such NCR over the land by passing that land to some other person within the community, subject to him handing over to the original owner what is traditionally called *tungkus asi*. The *tungkus asi* is a form of token (tanda) symbolising the transfer of rights of the cleared land to the new owner. This
E token is customarily of little value, perhaps fetching the value of a pig, usually handed over in front of the head of the community. The appellant, though an Iban, will fail to qualify as a legitimate recipient of the *temuda* from the vendors as he not a native of that community.

F **[39]** The novel argument that the S&Ps would fall under the phrase of "any other lawful method", which concerns only newly created NCR as provided for under s. 5(2)(f) of Cap 81, must equally fail by virtue of those eight lots being native customary land created prior to 1 January 1958. Lastly there is no hint of
G any provision in Cap 81 that legitimises any transfer of pre 1 January 1958 acquired NCR through the mode of S&Ps. Such a drastic change that drifts away from established natives customary law require express and clear language in Cap 81 (*Hj Khalid Abdullah v. Khalid Abg Haji Mazuki & Anor* (Kuching
H OM KG 3/1983-Land Cases (1969-1987); *Superintendant of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 per Arifin Zakaria FCJ (as he then was)).

[40] With the ineligibility of the appellant to inherit or acquire
I through the *tungkus asi* procedure, let alone the litany of case laws, inclusive of *Sat Ak Akum & Anor v. Randong Ak Charareng (supra)* and *Sumbang Ak Sekam v. Engkarang Ak Ajah (supra)*, establish that

individual customary rights are not transferable by sale or otherwise for value thus invalidating the S&Ps, the position of the appellant is tenuous. With the S&Ps being in contravention of customary land law in force immediately prior to 1 January 1958, the answer to questions 1(a) and (b) therefore must be in the negative.

[41] We find it unnecessary to answer question (ii) as the appellant in his pleadings stated that the eight lots are located in the native area land whilst this question pertains to native communal reserve, an area which has no bearing over the disputed properties.

[42] I now return to the alternative argument of the state legal counsel briefly touched earlier. He argued that the appellant's case rested on conditional sale and purchase agreements, and the express conditions were never fulfilled thus rendering the S&Ps void and ineffective. We agree with this submission.

[43] We therefore dismiss this appeal with costs. We now invite parties to submit on the amount of costs.

Richard Malanjum CJ (Sabah & Sarawak):

[44] I have read in draft the judgment of my learned brother Suriyadi Halim FCJ. I agree with his conclusion.

[45] But due to the important legal implications involved in this appeal I should give my views on the issues raised. It is also interesting to note that the courts below made reference to a decision of the Native Court of Appeal despite coming from two different judicial systems.

[46] Further, the answer to the questions posed, whether in the affirmative or negative has a far-reaching impact on the commercial value of native customary land ('NCL') in Sarawak. In other words, is NCL standing on the same footing as any titled land in Sarawak? Do 'holders' of NCL own them in the same way as titled lands in Sarawak?

[47] To begin with it may be useful to understand the various terminologies under NCL, namely:

> 'pemakai menoa' is a term given to an area of land selected by pioneers of a longhouse community who are usually related to each other for the construction of 'a longhouse with sufficient rooms arranged in a row, all joined together to accommodate the

families' And the longhouse will 'just expand to with new families'. And it is within the 'pemakai menoa' that the longhouse community will establish *'temuda'* which is an area of land accessible for farming and 'pulau' or 'pulau galau' which is the forest area where there may be rivers for fishing and the jungles for gathering of forest produce. The other Iban terms are 'tembawai' for old longhouse site; 'tanah umai' for cultivated land within 'pemakai menoa' and 'pendam' is cemetery. However, 'pemakai menoa' has its boundary usually based on streams, watersheds, ridges and permanent landmarks, separating it from another longhouse community.

(See: *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555; [2006] 1 MLJ 256 CA).

[48] Now, the questions posed for consideration read:

(i) Whether, the alleged adat or custom that "individual customary rights are not transferable by sale or otherwise for value" referred to and applied in *Sumbang Ak Sekam vs. Engkarang Ak Ajah* [1958] SCR 95 ceased to exist and enforceable as such:

(a) upon enactment of the same as law under s. 2 of the Fruits and Trees Order 1899, of the Rajah; and/or

(b) upon the subsequent repeal of the said Rajah's Order?

(ii) If the answers to question (1) above are in the negative, whether, by virtue of s. 6 of the Land Code, the alleged adat or custom applies only to land gazetted as native communal reserve?

[49] The above questions relate to several pieces of land ('the subject lands') that are now included in the block of land under documents of title issued in favour of the fourth defendant. And it is the contention of the appellant that the inclusion of the subject lands was unlawful since he owned them. He had purchased them from the original owners ('the vendors') who the appellant claimed to have acquired native customary rights ('NCR') over them. Yet there was no extinguishment of the NCR over the subject lands before alienating them to the fourth defendant. The preceding sentence may have some force if the vendors of the eight lots are involved in this case as they should be entitled to claim compensations for the loss of their NCL. (See: *Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 FC).

[50] During the hearing of the leave application and at the outset of hearing of this appeal the parties made several concessions. As such the followings are no longer in dispute:

(i) that from the subject lands the appellant is only pursuing for the eight lots comprising the 37.24 acres ('the eight lots') which he acquired by way of five sale and purchase agreements from five vendors. As such the giving of *'tungkus asi'* between the vendors of the eight lots and the appellant did not arise;

(ii) that these eight lots satisfied the requirements for NCL. As such it is not necessary in this judgment for a legal discourse in the acquisition or creation of NCL in Sarawak. The guiding legal principles pertaining to them have already been well enunciated in several decisions of this court and the Court of Appeal. (See: *Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh* (*supra*); *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* (*supra*));

(iii) that since the eight lots are NCL they are subject to the relevant adat and native customary laws such as:

(a) that the rights under NCL are, *inter alia*:

(i) 'heritable, passing ideally from generation to generation of households members'; or

(ii) transferable to the community or a member of the community of the longhouse of the original holder on payment of *'tungkus asi'* to the original holder but revert to the original owner if he returns or to his heirs if they return to the community; and

(iii) 'the rights taken over by the person paying the *tungkus asi* are inheritable by the heirs of the person'.

[51] The appellant is not disputing the adat and native customary laws as summarised above. And he is not claiming that he acquired NCR over the eight lots in accordance with the established procedure and requirements. His argument is that he took over the NCR of the eight lots by virtue of five sale and purchase agreements with the vendors. And his learned counsel in respect of the question (i) submitted that the dealings with the eight lots 'were not prohibited by or contrary to' any adat or

native custom. He argued that the adat or native custom as applied in *Sumbang Anak Sekam v. Engkarang Ak Ajah* [1958] SCR 95 is no longer in existence.

[52] Learned counsel premised his argument on the basis that adat or custom being in existence prior to the Fruits Trees Order 1889 ('the said order') 'became statute law when it was incorporated in s. 2 of the said order'.

[53] Subsequently the Land Regulations, 1920 repealed the said order. With the repeal, learned counsel argued, such adat and custom that became part of a statutory law were thus extinguished and obliterated 'altogether and, consequently, it could no longer be revived as a custom'.

[54] In other words, it is his contention that 'once a custom is extinguished by its enactment as law and the law in which it merged is itself repealed, the custom cannot be revived as such'.

[55] As regards the incorporation of such adat and custom in the *Tusun Tunggu* learned counsel contended that it is only applicable to the Ibans and Iban communities residing in the third, fourth and fifth divisions of Sarawak. The eight lots are in the first or Kuching division and were not subject to the *Tusun Tunggu*.

[56] In short, learned counsel for the appellant took the position that a 'holder' of NCL is entitled to sell it together with the NCR arising therefrom to another native buyer regardless of where that native buyer comes from.

[57] While learned counsel for the appellant submitted that there was **never** any adat or custom **prohibiting sale** of NCL and even if there was, it had been extinguished, learned counsel for the first and second respondents adopted a diametrically opposite approach. He submitted that there was **never** an adat or custom especially amongst Ibans that **allows the sale** of NCL. As such the question of extinguishment of an adat or custom did not arise upon the repeal of the said order. (emphasis added).

[58] Learned counsel for the first and second respondents went on to rely on the testimony of the adat expert (PW3 - Nicholas Bawin ak Anggat) called by the appellant who testified that there is no adat that permits the sale of customary land for value to any other person. If a person 'pindah' from his longhouse his rights to

his NCL 'will either go to the community or he can transfer such rights to a cousin or relative who will in turn provide him with *"tungkus asi"*'. A

[59] It was also highlighted that the vendors were neither parties to the action by the appellant nor made parties in this appeal. This point has significance in relation to the concession made that the eight lots were NCL. If at all there is any claim for the loss of the NCR over the eight lots it should have been made by the vendors. B

[60] Now, in order to appreciate the stances taken by the opposing sides, it is important to understand the actual position of NCL, including its historical background and purpose. C

[61] Briefly, NCL existed even before the Rajahs came to Sarawak. D

> At the time of James Brooke's arrival in Sarawak there had been for centuries been in existence in Borneo and throughout the eastern archipelago a system of land tenure originating in and supported by customary law. This body of custom is known by the generic term 'Indonesian adat'. Within Sarawak the term 'adat', without qualification, is used to describe this body of customary rules or laws; the English equivalent is usually 'native customary law' or 'native customary rights'. E

(See: AF Porter: '*The Development of Land Administration in Sarawak from the Rule of Rajah James Brooke to the Present Time (1841-1965)*' at p. 18. (See: *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769; [2001] 6 MLJ 241 HC). F

[62] And when the First Rajah ruled Sarawak the position taken was 'a consistent respect for native customary rights over land (see Anthony Porter - *The Development of Land Administration in Sarawak from the rule of Rajah James Brooke to the Present Time (1841-1965)*). In fact, James Brooke had referred to native customary rights as 'the indefeasible rights of the Aborigines' (see John Templer - *The Private Letters of Sir James Brooke, KCB, Rajah of Sarawak*). James Brooke was 'acutely aware of the prior presence of native communities, whose own laws in relation to ownership and development of land have been consistently honoured' (see Anthony Porter, p. 16). (See: *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* HC (*supra*)). G H I

[63] Thus, the recognition of NCL should no longer be an issue. In any event in this case it is not in dispute that the eight lots were NCL before they were alienated to the fourth respondent.

[64] In respect of the intended purpose, NCL were created and existed by and for the natives in Sarawak. NCL are basically meant:

(i) for farming ('*temuda*/*tanah umai*') on the land within 'pemakai menoa' that is 'an area of land held by a distinct longhouse or village community, and includes farms, gardens, fruit groves, cemetery, water and forest within a defined boundary (garis menoa)';

(ii) for fishing in the rivers therein; and

(iii) for the gathering of forest produce such as bamboo, 'damar' (resin) and timber for building boats and houses from the jungles ('pulau' or 'pulau galau').

[65] In short, NCL was and is intended for the upkeep and survival of the inhabitants of each longhouse community. There is no element of commercial enterprise involved. As Dimbab Ngidang puts it in his article 'transformation of the Iban land use system in post independence Sarawak:

> A close relationship between land, farming practices, and resource use among the Iban reveal important features of the community's agrarian roots. The traditional Iban farming system comprised a rich mixture of religious rites and cultural practices (Sather 1980, 1990 and Freeman 1955), and formed the basis upon which the pioneering ancestors of the present-day Iban first created customary rights to land in Sarawak.

[66] And NCL do not stand on the same footing as titled land alienated under the Sarawak Land Code ('SLC'). Recognition of NCL and the rights and interests arising therefrom are premised on common law principle. (See: *Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh* (*supra*). It is for that reason that I have put within inverted commas the word 'holder' in relation to NCL.

[67] As such adat and customs of the natives and that includes the Ibans in this case were very relevant in the creation and existence of NCL.

[68] At the same time it should also be appreciated that 'although the natives may not hold any title to the land and may be termed licencees, such licence 'cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is after payment of compensation'. (See: *Superintendent Of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* (*supra*) CA).

[69] Thus being licensee, an occupier of NCL is expected to use the NCL within the terms of his 'licence'. And one may say that the adat and customs of the Iban community are part and parcel of the licence. Moreover as a mere licensee he has no title to sell.

[70] Another interesting approach is by looking at the Ibans (natives) as part of the land. Being part of the land a native is not in a position to sell any interest in the land for he is but a mere trustee of the land for his next generation. In *Agi Ak Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 1 LNS 114; [2010] 4 MLJ 204 at p. 217 David Wong J (as he then was) said this poignantly:

> Let me also add that natives are the original inhabitants of the country and to treat claims for NCR by looking at it only from the point of ownership of the lands by the natives is not entirely correct. These claims should be looked at with the concept that the natives are part of the land as are the trees, mountains, hills, animals, fishes and rivers. My basis for saying this is simple. Prior to the arrival of white settlement there was no system of land ownership as we have now. There was no food processing factory then and they survived by foraging the land. The fruits on the wild trees, the fishes in the river, the wild boars and other animals on the land are their food for survival. It is not insignificant in this country that they are known as 'bumiputras'. It is my view that this concept must be kept at the forefront of our minds when dealing with native claims to lands.

[71] Having therefore noted the purposes in the creation and existence of NCL since the early days it now behooves upon me to consider the respective stances of the parties in this appeal.

[72] Since the Ibans' adat and customs are closely connected to the creation and existence of NCL it is only logical to consider whether there was or is any particular Ibans' adat and customs that deal with the sale of NCL.

[73] As discussed above the creation and existence of NCL is orientated for the benefit and welfare of the inhabitants of the area where it is created. This fact therefore give much credence to the opinion of the expert (PW3 - Nicholas Bawin ak Anggat) called by the appellant in that there has never been in existence any adat or custom that allows a 'holder' of NCL to part with it by way of sale.

[74] In fact the very existence of the clear adat and custom on the transmission of NCL from one generation to another in the same longhouse and the giving of *'tungkus asi'* to the 'holder' in the event of 'pindah' happening further supports such contention.

[75] If 'holders' of NCL were or are allowed to dispose them off by way of sale then the very purpose in the creation and existence of NCL as discussed above would be defeated. The native adat and custom of *'tungkus asi'* would be greatly undermined.

[76] Worse still in this case where the appellant is an Iban who came from a community in Julau, Central Sarawak and had no initial connection with the Iban community where the eight lots are situated. And there is no issue of 'pindah' in this case since it is the case of the appellant that he bought the eight lots by way of sale and purchase agreements from the vendors.

[77] Hence, if, to begin with, there was no adat and custom on transfer of NCL by way of sale, the question of extinguishment does not arise. As admitted by learned counsel for the appellant the promulgation of the said order by the Rajah did not encapsulate any prior existing prohibitory adat or custom on sale of NCL. Rather, the said order is a clear indication on the absence of a permissive adat and custom on sale of NCL. As such the issue on the applicability of the *'Tusun Tunggu'* in the Kuching division is not relevant.

[78] Incidentally, the absence of an adat and custom to allow the disposal of NCL by way of sale may have a bearing on the program called the 'new concept of development on native customary rights (NCR) land' initiated by the Sarawak State government. The program involves the participation by 'holders' of NCL with third parties by way of joint venture agreements. (See: *Masa Anak Nangkai & Ors v. Lembaga Pembangunan Dan Lindungan & Ors* [2011] 1 LNS 145). Fortunately that is not an issue in this case.

[79] As to the reference by the courts below the decision of the Native Court of Appeal it is not a case of the Civil Court taking that decision as a precedent. It is merely an adoption and application of the native adat and customs as applied by the Native Court of Appeal.

[80] Accordingly in view of the reasons above there is no necessity to answer question (i) but even if it is necessary the answer is in the negative. And for the same reasons given above question (ii) is also answered in the negative.

[81] This appeal is therefore dismissed with costs.